

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

**Wyman Gordon Tru-Form,
Employer,**

and

CASE NO. 4 -RC-126196

**United Steel Workers International,
Petitioner.**

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S
REPORT AND RECOMMENDATIONS ON OBJECTIONS TO ELECTION**

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August 20, 2014

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I. INTRODUCTION

Pursuant to Section 102.69 of the Board's Rules and Regulations, Wyman Gordon Tru-Form (the "Employer" or "Wyman Gordon"), by and through its undersigned counsel, hereby files this brief in support of its Exceptions to the Hearing Officer's Report and Recommendations on Objections to Election issued on August 6, 2014.

II. FACTUAL AND PROCEDURAL BACKGROUND

Wyman Gordon manufactures flash welded and cold-rolled rings and cases for case turbines primarily for application in the aerospace industry. The Union filed a petition on April 9, 2014 seeking to represent "all full time and regular part time Production and Maintenance employees by Wyman Gordon Tru-Form at its Plain, PA facility but excluding all office clerical employees, guards, professional employees and supervisors as defined by the act, and all other employees." The Employer sought to exclude audit inspectors, and shift or group leaders who met the criteria for Supervisor under Section 2(11) of the National Labor Relations Act ("NLRA" or "Act") from the unit. On April 21, 2014, the Union and Wyman Gordon stipulated that the unit and eligible voters would include all full time and regular part time production and maintenance employees and exclude all other employees, office clerical employees, audit inspectors, guards and supervisors (including group leaders) as defined by the Act. An election was held on May 21, 2014. The tally of ballot showed twenty-four (24) votes for and twenty-two (22) against the Union. There were no challenged ballots. Wyman Gordon timely filed its objections to the election with the National Labor Relations Board on May 27, 2014. (*See generally* Hr'g Tr., Exhibit B-1).

Wyman Gordon's objections stem from the Union's threats, efforts to intimidate, coerce, and dissuade anyone from voting against the Union. The objectionable conduct occurred

through a series of actions that took place during the critical period, destroying the laboratory conditions necessary for an election. Specifically, Wyman Gordon's objections at issue are as follows:

Objection No. 1: "During the critical period and prior to the election, the Union, by and through its supporters or agents, verbally threatened, coerced and intimidated certain employees with acts of retribution in the event that they chose to exercise their right to vote against representation by the Union thereby interfering with the right of free choice and participation in the election and destroying the necessary laboratory conditions for the election."

Objection No. 2: "During the critical period and prior to the election, the Union, by and through its agents, officers, and/or representatives acting on its behalf or with its implied endorsement, interfered with the fair operation of the election by making direct statements during meetings that interfered with employees' rights to speak freely and further interfering with the right of free choice and participation in the election and thereby destroying the necessary laboratory conditions for the election."

Objection No. 3: "During the critical period and prior to the election, the Union by and through its supporters, agents and/or third parties coerced and interfered with employees' free choice in the election and thereby destroyed the necessary laboratory conditions by contacting employees and telling them in a threatening manner not to vote if they intended to exercise their right freely and vote against representation by the union."

A. Intimidation at the Holiday Inn Express

Near the end of April 2014, Josh Antosh ("Antosh"), Russell Finch ("Finch"), and Adam Mewhort ("Mewhort") – all Third Shift employees of Wyman Gordon – attended an early morning meeting in the lobby of a Holiday Inn Express with representatives from the Union. (Hr'g Tr. 48-49; 95). Charles Pahler ("Pahler") and Kerry Lauer – two more employees – attended the meeting as well. Pahler drove Mewhort to the meeting because Mewhort is not able

to drive. (Hr'g Tr. 95). Although Pahler left shortly after the meeting began, testimony indicated that the meeting was held at his behest. (Hr'g Tr. 157). The two Union representatives at this meeting were James Gladysz ("Gladysz") and Chuck Meredith ("Meredith"). Antosh, Finch, and Mewhort all attended this meeting simply in order to be informed about the Union and what was occurring at their facility. (*E.g.*, Hr'g Tr. 49; 77-78). At the meeting, Antosh and Mewhort, in particular, had questions for the Union representatives. (Hr'g Tr. 50; 98-97). Following some initial questions from Mewhort, Antosh asked about the Union dues, what the Union would provide and whether the Union was "willing to fight" for him. (Hr'g Tr. 50; 78; 97). Antosh explained during his testimony that he understood that the Employer wanted certain people to be classified as supervisors, and the Union decided not to fight to have those four employees be a part of the bargaining unit. (Hr'g Tr. 50-51). Antosh testified that this concerned him, because "if they were willing not to fight for these individuals, that gave an example of how they could not fight for [him]." (Hr'g Tr. 51).

Meredith explained that the company classified those employees as supervisors, and listed five requirements that must be met in order for an employee to be considered a supervisor. (Hr'g Tr. 52; 78). Antosh replied that he, "along with 20 other people" performed some of the listed requirements. (Hr'g Tr. 52; 79). Meredith, a Union representative, became increasingly agitated and, finally:

A His response was, well, if you want me to contest your vote, I'll contest your vote.

Q How did he say it?

A He started getting agitated, like he didn't want to hear what I was having to say.

Q Now you weren't a supervisor, right?

A Not by any means.

Q And has the company ever classified you as a supervisor?

A Not at all.

Q Did anybody from the union ever ask you whether or not you fit any of the criteria as supervisor?

A No.

Q So as of the time you're having this conversation with Chuck [Meredith] from the union, there is no question you're not a supervisor, right?

A Not a supervisor by any means.

Q Okay. And he knew that.

A He knew that.

(Hr'g Tr. 53; *accord* Hr'g Tr. 78; 98). There was no question regarding Antosh's status as a supervisor, and Meredith did not reference Antosh as a potential supervisor when stating he would contest Antosh's vote. (Hr'g Tr. 67). The other employees also understood that Meredith's comment was about Antosh, not about whether or not he was a supervisor:

Q Chuck would challenge Josh's vote.

A Yes.

Q How did you take that comment?

A I felt that if 1 person is going to be challenged on something that probably 20 people has done, then why wouldn't the other 20 be done. I think for Josh, it was probably a bit threatening.

...

Q So I think, let's see if I understand, did you get the impression his statement was about Josh, about scheduling, or about challenging the vote?

A Oh, Josh.

Q About challenging Josh?

A Josh, yes.

(Hr'g Tr. 79-80) (Finch testifying).

Q Based on your observation, did you believe that Chuck [Meredith] was trying to intimidate Josh?

A Yeah. He was trying to get him to stop talking, stop asking questions. He was definitely out to get him to stop.

(Hr'g Tr. 103) (Mewhort testifying). ***Meredith did not threaten to challenge the votes of any other employee who had done scheduling or any of the other tasks described by Meredith.***

(Hr'g Tr. 86). The hearing officer credited the Employer's witnesses' testimony as to these

statements, thus it is clear that those employees who were supervisors were agreed to in advance, that Antosh is not and never has been classified as a supervisor, and Meredith did not indicate that we would contest the votes of any other employees.

Meredith's comment chilled Antosh's freedom of choice and ability to request information:

Q So if there is no question about whether or not you're a supervisor, how did you take what he said that he would challenge your vote?

A It took me back for a second. It made me double think what I wanted to say. If there was a sensitive issue how I felt, I wouldn't want to ask him in fear of, you know, if I said the wrong thing to him that it would -- ultimately, he would want to contest my vote and my vote wouldn't count.

(Hr'g Tr. 53-54) (Antosh testifying). The other employees had the same concern:

Q Okay. And do you understand what challenging a vote means?

A I think I do.

Q What's your understanding?

A That their vote either wouldn't count or that they wouldn't be allowed to vote.

(Hr'g Tr. 80) (Finch testifying). Meredith eventually became so agitated that he began to draw the attention of other people in the hotel lobby, and said to the employees present "if you guys are just going to vote no, then don't waste my time." (Hr'g Tr. 99). Again, the hearing officer credited the Employer's witnesses' accounts of this statement.

While Antosh directed his questions to Meredith, Adam Mewhort was asking questions of Gladysz. (Hr'g Tr. 54). Mewhort asked, assuming a union was in place, if he was having a problem with an individual in the bargaining unit, could he go to a supervisor. (Hr'g Tr. 54; 104). Gladysz responded that Mewhort would then be labeled a "rat." As Mewhort testified, and Antosh corroborated:

A He said, well, no, you don't just go to a supervisor. I said, well, why not? He said if you go to a supervisor, then the guys will consider you a rat. And he said I can't --

Q Okay. Is that all he said?

A He said I can't tell you exactly how people are going to treat a rat, but it's a rat.

(Hr'g Tr. 104-105) (Mewhort testifying).

Q All right. Did you hear any other comments by either Chuck the organizer or the other organizer to anybody of that nature?

A When we were there, we were talking and I heard Adam Mewhort, he was there, and he was talking to the organizer, Jim. And he said if he had a problem with an individual in the bargaining unit, he said if I had to go about that, could I go to my supervisors and report that. And he says, well, you could, but you'd be labeled as a rat and we don't know how the guys in the bargaining unit would be, you know, how they would perceive that and how they would react.

Q How did you take that?

A I didn't like it. It wasn't -- I don't think it was fair to Adam.

Give me one second, I got a little --

Q Take your time.

A Got a dry mouth here. It was in a sense a threat that he couldn't speak his mind; that he had to be in fear of retaliation of what he would say.

(Hr'g Tr. 54) (Antosh testifying). Demonstrably, Mewhort and Antosh again provided consistent testimony. As such, the hearing officer did not credit the Union representatives' inconsistent attempts to shift blame for any mention of a "rat" to Antosh.

Mewhort further explained that the "rat" comment:

A Well, it definitely didn't make me feel good. It definitely made me feel uncomfortable with the idea of a union. It made me feel -- it made me feel intimidated to the point that I couldn't -- I wouldn't be able to do those things, to be considered a rat and obviously that has bad connotations with it, if you can't say what they do to a rat, but it's a rat, you know.

(Hr'g Tr. 104-105). Given the foregoing credited accounts of this meeting, there is no reason not to credit the impression that these statements made on Mewhort.

B. Threats and Intimidation on the Bathroom Walls

In addition to the threats and attempts at intimidation and coercion by the Union representatives at the Holiday Inn Express meeting, Antosh was publicly threatened and intimidated by the Union and/or its supporters. Antosh's name was frequently featured in "derogatory" comments on the bathroom wall. Antosh, Finch, and Mewhort testified that they observed the following comments on the bathroom walls at the Wyman Gordon facility:

- "Josh likes company sperm;"
- "Antosh equals a mouthful of Brink [the area manager] and an ass full of Troutman [the general manager];" and
- "Don't worry, daddy will get you another job."

(Hr'g Tr. 55; 81; 110-111); (*see also* Hr'g Tr., Exhibit E-3). Antosh testified that these were just examples of the writings on the bathroom wall, and that there were others during the petition, despite efforts to clean the walls. (Hr'g Tr. 56). *No other employee was specifically mentioned on the bathroom walls, but every other employee in the facility would have seen the writing about Antosh on the walls.* (Hr'g Tr. 57; 81; 87; 112). The testimony from three of the Employer's witnesses regarding the writing on the bathroom walls was not contradicted.

C. Intimidation at the General Meeting

Following the meeting at the Holiday Inn Express, Mewhort attended the general meeting at the Union hall the next day. (Hr'g Tr. 105-106). The meeting was on a Sunday evening, beginning at 6:00 pm, but Mewhort did not arrive until 6:45 pm because he had trouble finding his way to the meeting. (Hr'g Tr. 121). Gladysz and Dave Moore, the President of United Steelworkers Local from the Wyman Gordon Mountain Top facility, were the Union

representatives at that meeting. Mewhort's testimony regarding the events at the Union hall were credited by the hearing officer:

Upon arrival, Mewhort began asking why the Union compromised with the company to exclude certain employees – the supervisors – from the bargaining unit. (Hr'g Tr. 106). He was interrupted by Moore who asked in a loud and aggressive tone, "who is that." (Hr'g Tr. 106). Whereupon others began to mock Mewhort and refer to him as "Antosh." (Hr'g Tr. 106). Mewhort also testified that he was intimidated by Moore from the beginning of the meeting. (Hr'g Tr. 107). This testimony is uncontroverted.

Following the general meeting, Mewhort spoke to Pahler, a Union supporter and agent who had arranged for the earlier meeting at the Holiday Inn Express, about the meeting: "And I asked him what was up with that Dave Moore getting so fired up and he didn't even, you know, I wasn't even -- he said, Chuck said, well, you shouldn't have been talking -- you shouldn't have brought your anti-union stuff in there" Then, echoing the statements Union representative Meredith made at the meeting at the Holiday Inn, Pahler went on to say, ". . . if you, you know, if you talk like that and you're going to be a no, you shouldn't even come." As Mewhort further testified:

A At which point, I said I thought these were meetings and the point of these meeting was to get information. And he then said no. And he also told me that if people didn't go to the meetings, themselves, I shouldn't be talking to them about the meetings, either.

Q Did he say anything specific to you about Mr. Moore?

A He had said I was lucky that Dave Moore didn't throw me out.

(Hr'g Tr. 108-109). Pahler tried to prevent Mewhort from getting information directly from the Union, tried to prevent Mewhort from providing information to others, *and* tried to prevent Mewhort from discussing the Union with his co-workers that Pahler perceived to be "anti-union":

Q Did you ever have a chance at any time to speak with Josh Antosh while you were at work?

A Yes.

Q And did anyone ever observe you speaking to him?

A Yes.

Q Who?

A Chuck Pahler.

Q And what did he say to you?

...

A After he saw us, he saw me talking to Josh, saw us talking together, he said don't talk to that anti-union fuck.

(Hr'g Tr. 108-109). Antosh was aware that Pahler referred to him as that "anti-union fuck."

(Hr'g Tr. 57).

As with most of the testimony of the Employer's witnesses, none of the testimony regarding Pahler's statements has been contradicted. Mewhort believed that Pahler was working to get a position with Union, and Pahler later told him that he became a union third shift grievance person. (Hr'g Tr. 110; 132-133). Finally, Pahler gave numerous employees, including Mewhort, Tim Ancherani, and Donnie Emerick, the impression that "no" votes would not matter because "the guys who were pro-union already had it locked up." (Hr'g Tr. 115-117); (*see also* Hr'g Tr. 117-118 (referring to Chuck Pahler as "union people")). As Mewhort explained, this additional method of coercion coupled with the months-long atmosphere, penetrating the facility, of threats, intimidation, and harassment left employees feeling as though their vote would not matter, even if they voted and voted against the Union:

And that's how these gentlemen felt. These gentlemen felt as though -- from my conversations with them, they felt as though it doesn't matter what we vote, because they've already, you know, they've already claimed the victory. And I tried to -- I attempted, at that time, to encourage them and to tell them, you know, go and vote, and do what's best for yourselves.

But after months of enduring the type of things we talked about, whether it be being scared by the writing on the wall, being segregated into that what they called the anti-union group or whatever -- well, they didn't call it that. I'm sorry, that was wrong. But in my impression what became kind of this group of people who thought against the union or this group that thought for it, you know, that after months of enduring those type of harassments.

(Hr'g Tr. 120) (emphasis added).

D. Threats Against William Eppley

William Eppley ("Eppley") is employed by Wyman Gordon as a Final Inspector on First Shift. After the petition was filed, during the critical period and while working at a Wyman Gordon facility, Eppley went to have a cigarette by himself in the small pavilion area near the loading dock. (Hr'g Tr. 24). This portion of Wyman Gordon's facility is a closed area, and Eppley was initially by himself when he was smoking the cigarette. (Hr'g Tr. 25). However, while Eppley was smoking a cigarette in this closed portion of the facility, two co-workers, Rodney Nethercott ("Nethercott") and Craig Schaffer ("Schaffer"), approached Eppley. (Hr'g Tr. 25). During this encounter, Eppley was essentially cornered by his co-workers:

A They -- I was out there, initially. I can't for say that they followed me out there, but they went out there with me afterwards.

Q And describe Rodney Nethercott for us.

A Approximately, 6 foot, 5'11", 6 foot, 240 pounds, long hair, ponytail.

Q Two forty. A big guy?

A Bigger than myself, yes.

Q Bigger than you. How about Craig Schaffer, is it?

A Craig, yes, Craig Schaffer. He's actually a substantially bigger guy. He's just bigger all around, about -- he's probably maybe 6'2", approximately the same weight, but it's not distributed the same as Rodney. It's not all belly. He's just bigger muscle mass.

Q Bigger than you?

A Yes.

Q Was there anyone else out there, at the time?

A No.

Q And you described a bit about the pavilion. Is it round?

A It's rectangular.

Q So it's rectangular. Where -- when they came into the pavilion and you were having a cigarette, where were they standing in relation to you?

A In front of me.

Q So they were directly in front of you?

A Directly in front of me.

Q Would you have had to have gone around them to get out the door?

A If I was to go out into the yard, yes.

(Hr'g Tr. 26-27).

Eppley testified that the two men warned him: "'Make sure you don't make the same mistake you made last time,' regarding a vote [at the facility] several years ago regarding a union," and if he made the "same mistake" during the vote this time, he would again be an "outcast." (Hr'g Tr. 27). Eppley explained that he was an outspoken "no" vote for the union the last time around, and was ostracized to the point of slowing down his work as a result. (Hr'g Tr. 28-29). With this past retribution to inform him, Eppley believed "without a doubt," that he would again be an outcast if he voted against the union. (Hr'g Tr. 29). Moreover, Eppley specifically testified:

Q In your opinion, do you believe that the comments by Mr. Schaffer and Mr. Nethercott were meant to coerce you in any way?

...

A Yes, I believe it was an attempt to coerce me to voting for the Union.

Q Did you feel threatened?

A Yes.

Q And did you feel that there was an attempt to intimidate?

A Yes.

Q Why?

A Because of the previous acts of them. I was fearing that that was going to happen again.

Q And you didn't want that?

A I did not want that.

Q Do you recall right around when this conversation may have happened?

A Approximately, first week of April roughly.

Q From your perspective, you understand it was after the petition was filed --

A Correct.

(Hr'g Tr. 31-32). Eppley explained that he allowed co-workers to believe that he was a yes vote out of fear based on what happened the last time. (Hr'g Tr. 34).

Shortly after the encounter with Nethercott and Schaffer, on April 18, 2014, Eppley went out on disability. (Hr'g Tr. 32). While out on disability, Eppley received text messages from two co-workers, Nethercott and Jeff Weaver ("Weaver"), on May 20, 2014, less than twenty-four (24) hours before the election. (Hr'g Tr. 32-33). The text message from Nethercott demanded that he "get [his] Ass in here tomorrow." (Hr'g Tr. 34). The text message from Weaver, however, was even more specific:

Q What did the text from Mr. Weaver say?

A I'm trying to think word for word. Better -- better get your ass in here to vote tomorrow; that is unless, of course, you are a no vote.

Q How did you interpret that?

A If you're going to vote for us, come in. If you're not going to vote for us, don't come in.

Q In other words, don't vote?

A Yes.

MR. MCGURRIN: Objection, leading.

BY MR. GRIMALDI:

Q How did you interpret that?

A If you're not going to vote for us, we don't want you there.

Q Now did you think that these texts were in any way, shape, or form a joke?

A No.

Q Why?

A Based upon their previous statements.

Q How did you feel when you saw them?

A Intimidated to vote in a way in which they wanted me to vote.

(Hr'g Tr. 35-36). In combination with the earlier encounter with Nethercott and Schaffer, and the retribution Eppley previously experienced when he voted against unionization, Eppley reasonably and understandably construed the text messages as yet another attempt to threaten and coerce him into voting in favor of the Union on May 21, 2014.

III. ANALYSIS

For the reasons set forth below and in the Employer's Post-Hearing Brief on Objections, the Employer has taken exception to certain findings, conclusions and recommendations of the hearing officer concerning the objectionable pro-Union conduct. The election that took place at Wyman Gordon was not just close, the margin was razor thin, with the final tally at 24 in favor of the Union to 22 votes against. (See Hr'g Tr., Exhibit B-1).

In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is [the Board's] duty to establish those conditions; it is also [the Board's] duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

General Shoe Corp., 77 NLRB 124, 127 (1948). Even if only one vote was impacted by the actions credibly explained by the Employers' witnesses, that one vote changes the outcome of the election. Given the standard set forth by the Board, Wyman Gordon's objections should be sustained, the election be set aside, and a rerun election be ordered in accordance with the National Labor Relations Board's Rules and Regulations.

A. Eppley Was Threatened and Intimidated by Coworkers (Exceptions 1-2)

The record is clear that Nethercott and Schaffer threatened and intimidated Eppley during the conversation at the pavilion and via text message. The hearing officer, however, believes

that the record fails to establish that these interactions were “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Westwood, infra*, 270 NLRB at 803. The hearing officer’s findings and conclusions in this regard are mistaken.

1. Agency Is Irrelevant Where an Atmosphere of Threats and Reprisal Renders a Free Election Impossible.

The Board has explained that third-party threats rise to the level of objectionable conduct where they are “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 615 (2002). *See also Poinsett Lumber and Mfg. Co.*, 116 NLRB 1732, 1739 (1956) (finding it “unnecessary to determine whether or not such serious and coercive conduct can be attributed to the Union because the important fact is that an atmosphere of fear and reprisal existed and that a free election was thereby rendered impossible” (emphasis added)); *Sonoco of Puerto Rico, Inc.*, 201 NLRB 493, 494 (1974) (explaining that where none of the threats were attributable to the union, “the Board has set aside elections where the conduct created a general atmosphere among the employees of confusion and fear of reprisal for failing to vote for or to support the union”). In determining the seriousness of the threat, the Board will consider: the nature of the threat; whether the threat encompassed the entire bargaining unit; whether reports of the threat were widely disseminated within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of [that person’s] capability of carrying out the threat; and whether the threat was “rejuvenated” at or near the time of the election. *See Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). Threats other than physical harm also may be grounds for a new election. *See, e.g., Lyon’s Restaurants, Subsidiary of Consolidated Foods Co.*, 234 NLRB 178 (1978) (setting aside an election in which employees were threatened with loss of their jobs unless they voted for the union).

The Board has further explained that it is “immaterial that fear and disorder may have been created by individual employees or non-employees and that their conduct cannot be attributed either to the employer or to the union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible.” *Al Long*, 173 NLRB 447, 448 (1968) (emphasis added). *See also Cedars-Sinai Medical Center*, 342 NLRB 596 (2004) (setting aside an election where two antiunion employees received anonymous telephonic threats). In *Cedars-Sinai*, the Board reasoned that the threats were no less “threatening” simply because they were made anonymously as opposed to directly. *Id.* Where, as here, these conditions of confusion and disorder exist, the “laboratory conditions” – in which Board-conducted elections must occur – have been destroyed.

2. The Employer offered specific, detailed examples of employees at the Wyman Gordon Tru-Form facility observing or experiencing the repercussions of opposing the Union.

Eppley was personally threatened by his co-workers, on behalf of the union. Not only was the threat of retribution specific, but, as Eppley testified, he knew from past experience when you voted against unionization, you suffered retribution from union supporters. (E.g., Hr’g Tr. 32). It is “immaterial that the . . . threats . . . did not go beyond [Eppley].” *See Smithers Tire & Auto. Testing of Texas, Inc.*, 308 NLRB 72, 73 (1992) (noting that the threatened employee’s vote, along with one other, “could reverse the outcome of the election,” and “[t]he threats were obviously intended to influence [the employee’s] vote . . .”). Eppley’s explanation that he would have been able to get around his co-workers does not lessen the attempt at intimidation, nor the intimidation that Eppley testified to feeling. (Hr’g Tr. 31-32). The hearing officer failed to note that Eppley’s feeling of being threatened and intimidated did not just come from the physical intimidation at the time, but was also informed by his past experience. (Hr’g Tr. 31-32).

A month later, on the eve of the election, Nethercott renewed his attempts to coerce and intimidate Eppley by sending him a text message demanding that he “get [his] Ass in here tomorrow.” Jeff Weaver was even more explicit with his attempts at coercion and intimidation, telling Eppley to “get in here and vote, unless you are voting no.” The content of these text messages is, again, not in dispute. Weaver’s intent is not relevant. *See Smithers Tire*, 308 NLRB at 72 (explaining that the test to be applied is “whether a remark can reasonably be interpreted by an employee as a threat. The test is not the actual intent of the speaker or the actual effect on the listener.”). Indeed, Eppley knew this was no joke, he knew from experience that the threats were serious, and he would, again, suffer retribution if he voted against the Union.

In assessing Eppley’s interactions with Nethercott, Schaffer, and Weaver, the hearing officer misapplies the Board’s opinions in that she fails to “carefully scrutinize” this third party behavior given the one vote margin at issue. *E.g., Robert Orr-Sysco Food Servs.*, 338 NLRB at 615 (“Objections must be carefully scrutinized in close elections.”). Indeed, Eppley could very well have been the one vote that resulted in a Union victory. Thus, the hearing officer’s finding that the Employer failed to show that Schaffer or Nethercott’s statements to Eppley created a general atmosphere of fear and reprisal rendering a free election impossible is incorrect and, therefore, the Employer provided sufficient evidence to sustain Objection 1.

B. Public Threats and Intimidation Directed to Antosh and Mewhort at the Holiday Inn Express Destroyed Laboratory Conditions, and Interfered with Employee’s Free and Uncoerced Choice in the Election (Exceptions 3-6, 10)

The hearing officer erred in finding that the conduct by Union representatives at the Holiday Inn Express did not constitute objectionable conduct. In considering whether to set aside an election, the Board has explained that “[t]he test, an objective one, is whether the

conduct of a party to an election has the tendency to interfere with employees' freedom of choice. In making its determination as to whether the conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, inter alia, the closeness of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995) (citing *Hopkins Nursing Care Center*, 309 NLRB 958 (1992)) (finding that three instances of objectionable conduct with regard to two employees "could well have affected the outcome of the election"). "***Threats by union agents warrant the setting aside of an election where they 'reasonably tended to interfere with the employees' free and uncoerced choice in the election.'***" *Robert Orr-Sysco Food Servs.*, 338 NLRB at 615 (emphasis added) (citing *Baja's Place*, 26 NLRB 868 (1984)); *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 533 (9th Cir. 1986) (setting aside the election where a supervisor's threats "reasonably tended to coerce and intimidate [certain] employees in the exercise of their rights protected under the [National Labor Relations] Act" (citation omitted)).¹ At the Holiday Inn Express, Jim Gladysz and Chuck Meredith created an atmosphere of fear and reprisal. As set forth in detail above, Antosh was publicly threatened ***by Union representatives*** when he attempted to gain information to make an informed decision. As Antosh, Finch, and Mewhort all

¹ In *Chicago Metallic*, the election was set aside where:
The Board found expressly that: (1) Picazzo made threats of job reprisals and physical harm to employees who opposed the Union, (2) following one such instance, the threatened employee's car was vandalized, (3) graffiti on the plant's bathroom wall threatened physical harm against two anti-union employees, and (4) knowledge of these events was widespread throughout the unit. ***Even more telling is the closeness of the vote.*** A difference of only five votes could have changed the outcome of the election. 794 F.2d at 532 (emphasis added). The Ninth Circuit identified the most telling fact as the ***closeness*** of the vote, not the other factors discussed by the hearing officer in an attempt to distinguish the case. (Report, p. 18). Here, this crucial factor weighs heavily in favor of Employer because the Employer lost the election by a single vote.

credibly testified, Meredith told Antosh that his vote would be challenged. (Hr’g Tr. 53; 78; 98).

It was clear to everyone there that the challenge was about Antosh, not about supervisors:

A When we were standing there, he said, well, listen, if you want me to contest your vote, I’ll contest your vote. And that was all, nothing about a supervisor.

(Hr’g Tr. 67) (Antosh testifying).

Q Chuck would challenge Josh’s vote.

A Yes.

Q How did you take that comment?

A I felt that if 1 person is going to be challenged on something that probably 20 people has done, then why wouldn’t the other 20 be done. I think for Josh, it was probably a bit threatening.

...

Q So I think, let’s see if I understand, did you get the impression his statement was about Josh, about scheduling, or about challenging the vote?

A Oh, Josh.

Q About challenging Josh?

A Josh, yes.

(Hr’g Tr. 79-80) (Finch testifying).

Q Based on your observation, did you believe that Chuck was trying to intimidate Josh?

A Yeah. He was trying to get him to stop talking, stop asking questions. He was definitely out to get him to stop.

(Hr’g Tr. 103) (Mewhort testifying). The hearing officer credited the accounts of the Employer’s witness of this meeting over the testimony of the Union witnesses. Thus, it must be concluded that Antosh left that meeting afraid that his vote would not count. (Hr’g Tr. 53-54); *see, e.g., Steak House Meat Co.*, 206 NLRB 28, 29 (1973) (setting aside the election and explaining that “the fact that the threats were directed at only one employee does not necessarily lead to the conclusion that no general atmosphere of fear and coercion existed”). Those around him saw that the Union representatives were threatening Antosh, and trying to get Antosh to “stop talking,

stop asking questions.” (Hr’g Tr. 102-103). They also believed that if a vote was challenged, that person would not be allowed to vote or his vote would not count. (Hr’g Tr. 79-80). There is no reason not to credit their testimony.

Likewise, the hearing officer credited the Employer’s witnesses’ testimony that Mewhort was warned by Jim Gladysz that he would be considered a “rat” if he asked a supervisor a question once a Union was in place. And, as Gladysz then pointed out, he “could not tell [Mewhort] how people would react to a rat.” (Hr’g Tr. 104). It reasonably follows, contrary to the hearing officer’s finding, that this comment, made by a Union representative, made Mewhort feel intimidated and uncomfortable. (Hr’g Tr. 104). The Union representative made it clear that the repercussions of being a “rat” would not be good. Other employees were still present for this display of Union intimidation and coercion:

A When we were there, we were talking and I heard Adam Mewhort, he was there, and he was talking to the organizer, Jim [Gladysz]. And he said if he had a problem with an individual in the bargaining unit, he said if I had to go about that, could I go to my supervisors and report that. And he says, well, you could, but you’d be labeled as a rat and we don’t know how the guys in the bargaining unit would be, you know, how they would perceive that and how they would react.

Q How did you take that?

A I didn’t like it. It wasn’t -- I don’t think it was fair to Adam. . . .

. . .

A . . . It was in a sense a threat that he couldn’t speak his mind; that he had to be in fear of retaliation of what he would say.

(Hr’g Tr. 54) (Antosh testifying). After dancing around many questions throughout the meeting, and responding with aggression and threats to others, Meredith asked the employees gathered in the small area of the hotel lobby, “if you are a no vote, why are you wasting my time.” (Hr’g Tr. 99). In this atmosphere, where only one vote makes all the difference, the Employer provided credible and credited evidence and testimony that the statements made at this meeting would

reasonably tend to interfere with employee free choice. Thus, the hearing officer's finding that the comments in this meeting were not objectionable is mistaken, and the Employer has thus set forth further evidence that Objection 1 should be sustained.²

C. Comments on the Bathroom Wall Contributed to the Atmosphere of Fear and Reprisal Rendering a Free Election Impossible (Exception 7)

The hearing officer erred in finding that the comments on the bathroom wall do not constitute objectionable conduct. Antosh, alone, was singled out in writings on the bathroom walls: "Antosh loves Company sperm;" "Antosh has a mouthful of Brink and an ass full of Troutman; and "Don't worry daddy will get you a new job." Why would Antosh need a new job? Because the Union, through its supporters and agents were threatening him in the job he already had. Not only did the Union through its supporters and agents threaten and attempt to intimidate and coerce Antosh, but they did so publicly, thereby intimidating the entire workforce. If a Wyman Gordon employee wondered how they would be treated if they questioned the union or exercised their right for free choice, they need look no further than the bathroom walls to see that they would be singled out and have their job publicly threatened if they did not go along with the union. *E.g., Lyon's Restaurants, Subsidiary of Consolidated Foods Co.*, 234 NLRB 178 (setting aside the election "based on Petitioner's various threats of job loss made to the employees prior to the election which the employees could reasonably have believed Petitioner was capable of carrying out . . ."); *Chicago Metallic Corp.*, 794 F.2d at 533 (setting aside an election where "[k]nown anti-union employees were targeted," and "[e]ffective debate was chilled by the unit's knowledge that those employees who [opposed the union] risked physical

² Because the hearing officer erred in finding that the statement from Meredith to Antosh about "wasting his time" was not objectionable, the hearing officer thus erred in concluding therefrom that the conduct alleged in support of Objection 2 was objectionable, as the Employer provided sufficient evidence in support of this allegation.

harm, property damage or job reprisal”). *See also Cedars-Sinai Medical Center*, 342 NRLB 596 (2004) (setting aside an election where two antiunion employees received anonymous telephonic threats, reasoning that the threats were no less “threatening” simply because they were made anonymously as opposed to directly). Mewhort’s credited testimony demonstrated that the writing on the wall made employees ask whether they would want to be lumped in with Antosh and treated like him. (Hr’g Tr. 114). As such, the hearing officer erred in finding that the comments on the bathroom wall do not constitute objectionable conduct and, therefore, the Employer provided further evidence to sustain Objection 1.

D. Public Threats and Intimidation Directed to Mewhort at the Union Hall Destroyed Laboratory Conditions, and Interfered with Employee’s Free and Uncoerced Choice in the Election (Exceptions 8-9)

Mewhort also attended the general meeting at the Union Hall in hopes of getting answers to his questions. Mewhort asked questions about the employees that the union agreed to designate as supervisors. Moore, the President of United Steelworkers Local from the Wyman Gordon Mountain Top facility, interrupted Mewhort and wanted to know who was asking questions. (Hr’g Tr. 106). Thereafter, Mewhort was referred to as “Antosh.” (Hr’g Tr. 106). The hearing officer credited Mewhort’s account of what happened at the Union Hall, but, despite this credit, failed to credit the degree to which Mewhort explained that he was intimidated. Mewhort, along with any other employee who used the bathroom, knew what happened if you were an “Antosh” – you were threatened and harassed. Following this credited account, Mewhort reasonably testified that he felt threatened and intimidated. (Hr’g Tr. 107). That Mewhort stayed at the meeting is irrelevant. That does nothing to diminish or change the fact that Moore publicly intimidated Mewhort, chilling any further dissent or questioning during the general meeting in an effort to curb any anti-Union questions. Therefore, the hearing officer

erred in concluding both (1) that Mewhort exaggerated the extent to which he was intimidated, and (2) that Moore's actions at the Union Hall meeting were not objectionable, and, therefore, the Employer provided further evidence to sustain Objection 1.

E. Chuck Pahler was an Agent of the Union and Statements Made by Him Constitute Objectionable Conduct (Exceptions 11-12)

Not only did Mewhort witness how Josh Antosh was treated at the early Holiday Inn Express meeting and on the bathroom walls, but, as Mewhort explained, he was specifically warned to stay away from Antosh, "that anti-Union Fuck." (Hr'g Tr. 109). Contrary to the hearing officer's conclusion, testimony demonstrated that Pahler was an agent for the Union. (Hr'g Tr. 110; 132-133). Even if Pahler never did obtain a position with the Union, his demeanor, statements and tone led Mewhort and others to believe that he was an agent of the Union and that he would become a Union officer. *See Basile v. H & R Block, Inc.*, 761 A.2d 1115, 1120 (Pa. 2000) (explaining that the common-law agency doctrine is comprised of three elements: (1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and, (3) *the understanding of the parties that the principal is to be in control of the undertaking*).

Following the Union Hall meeting, Mewhort was told by Chuck Pahler³ that he should not have angered Moore, and Mewhort should not be in meetings if he was a "no" vote. Mewhort was also told not to share information from the meetings with those employees who had not been at the meeting. Pahler purposefully left Mewhort and other employees with the impression that their votes would not matter, that the Union had plenty of support without them.

³ Even if the Board agrees with the hearing officer and declines to find that Pahler was indeed an agent of the Union, Pahler's conduct rises to an objectionable level under the third-party conduct standard set forth in *Westwood*, *supra*.

Contrary to the hearing officer's findings, this could and was reasonably taken as an additional method of coercion. The message and coercion was clear: you do not need to bother voting if you are voting against the Union; the Union is going to win anyway. The credited testimony alone demonstrates that the Union, through its supporters and representatives, made it very clear to Mewhort, among others, that he was not free to ask questions and obtain information, and if he did not vote for or challenged the Union – even if it was already in place – he would suffer retaliation.

F. The Conduct at the Wyman Gordon Tru-Form Facility, Taken Together, Constitutes A Pattern of Coercive Conduct Creating a General Atmosphere of Fear and Reprisal that Would Render a Fair Election Impossible (Exceptions 13-14)

It is well-established that the narrowness of the vote in an election is a relevant consideration. *E.g.*, *Robert Orr-Sysco Food Servs.*, 338 NLRB 614, 615 (2002) (“Objections must be carefully scrutinized in close elections.”). *See also Hickman Harbor Service v. NLRB*, 739 F.2d 214, 220 (6th Cir. 1984) (selective misconduct in small unit and close vote persuaded the court to set aside the election). “Where, as here, the votes of two threatened employees could be determinative of the election, there is a substantial question whether the tally in favor of the Petitioner reflected the free choice of a majority of the employees.” *See Smithers Tire & Auto. Testing of Texas*, 308 NLRB 72 (1992) (ordering a second election). The hearing officer failed to distinguish *Smithers Tire* from the facts set forth herein. There is, however, a significant difference between the instant case and *Smithers Tire*: here there were known threats to at least three employees, the intimidating and coercive acts were widely disseminated, and ***just one vote*** could have determined the outcome of the election. *See id.* The hearing officer did, appropriately credit the facts as set forth by the Employer's witnesses. She failed, however, to credit much of their testimony with regard to intimidation felt by the employees. However, the

Employer's witnesses provided consistent testimony, corroborated at various points by testimony of one another and documents. Moreover, the four witnesses for the Employer have nothing to gain and everything to lose by providing the testimony they did, including the impact of the statements and conduct by the Union representatives. Each of Employer's witnesses was calm, candid, consistent with themselves, each other and the documents. As such, their testimony supporting the atmosphere of threats, intimidation, fear and coercion set forth herein and in support of the Employer's objections should be credited, and, therefore, taken together, the foregoing facts set forth sufficient evidence to sustain Objection 3. Thus, it is clear that the hearing officer erred when she failed to find *at a minimum* there was a pattern of coercive conduct at the Wyman Gordon Tru-Form facility in the weeks and days leading up to the election that rendered a free election impossible.

IV. CONCLUSION

As argued above and in the Employer's Post-Hearing Brief on Objections, the conduct in question created an atmosphere so penetrated with threats, coercion, confusion, and fear of reprisal, a free election was rendered impossible. As a result, Wyman Gordon respectfully requests that the Board reject the hearing officer's findings with respect to whether the conduct alleged was objectionable and sustain the Employer's objections, set aside the election, and order a rerun election in accordance with the National Labor Relations Board's Rules and Regulations.

Date: August 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

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